DEVELOPING ETHICS AND RESISTANT LAW

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It is written in the philosophy of Wang Yang-ming that "the principles of righteousness have no fixed abode." In this expression of oriental wisdom may be found a valid criticism of the occidental tendency to sanctify transient law and to give to current notions of justice the authority of divine commandments. It is a short step for those affected with this tendency to proceed from condemning every violation of an official order as a lawless act, to denouncing every criticism of an established rule as an incitement to law-breaking. It is a short step from advocating reverence for the law to insisting upon reverence for the human being who announces or enforces the law.[1]

It is the purpose of this article to suggest some of the dangers arising from the encouragement of this tendency, dangers threatening disintegration of the social fabric, which is held together not by the rigidity but by the flexibility of its legal strands. Human nature is not the unchangeable quality assumed by those whose vision is limited to a few generations. Human nature is a persistent development, wherein dominating motives and purposes are transformed in strength and direction from day to day under pressure of living conditions that are undergoing constant changes through the increasing exploitation of natural power by man power.

Let us consider one significant example of this mutability of human nature, in order to make clear at the outset how interwoven is the fact of the change of the individual attitude and the necessity for flexibility in the legal rules of human conduct.

In the conditions generally prevailing in the world prior to the industrial epoch each man relied largely upon himself or upon some one directly under his influence to provide him with the necessities of life. He tilled the soil for the production of food. He raised domestic animals or hunted wild beasts to furnish him with clothing. He cut down trees or quarried stone with which to build him a shelter. If he did not do these things himself he exercised power directly upon other men to compel them to perform this service. The overwhelming majority of men worked with their own hands to provide themselves with the essentials of a tolerable existence.

Therefore it came about that the dominant social desire of this overwhelming majority was for freedom from servitude to others. They

[1] "An attack upon the judiciary is in fact an attack upon the union." Chief Justice Marshall in 1821.

resented any political system which supported a social system wherein a large part of their labors benefited others, whereby they were deprived of the better food and clothing and shelter which they could provide for themselves if they were free to labor wholly for themselves.

Thus the governments of the great states of the world were gradually transformed from institutions for the enrichment of the lives of the few into institutions for the partial protection of the liberties of the many. The transformation has not been completed, largely because of that resistant quality of the law, which retards the development of an orderly society, to such an extent that explosive periods of lawlessness provide a recurrent warning against the abuse of legal power—a warning least heeded by those who need it the most. But to a considerable extent the desire of the individual to work for himself has brought about in a few centuries the establishment of a legal principle that economic freedom is a right which should be protected by government.

During these centuries, however, the industrial development of society has been steadily changing the nature of individual desires, so that today, with the right of economic freedom only partially established, we find the fact of economic dependence pressing heavily upon an enormous proportion of the populations which participated in the debacle of a world-wide war.

The workers in the industrial centers of the world are no longer able to provide themselves with food or clothing or shelter. They are dependent upon farmers, millers, truck-gardeners, garment-makers, shoe factory operatives, brick-makers, lumbermen, carpenters, masons, transportation men. In a word, they are dependent for the absolute necessities of life upon the continuous service of large groups of other workers, usually remote from them and not subject to their influence in any fixed way except through the processes of government. The workers on the farms retain a measure of independence as to food and shelter; but for the enjoyment of the living conditions possible to industrious citizens of the modern state they are also dependent upon the continuous labor of their fellow-workers.

This interdependence of the citizenship of a twentieth century nation has brought about a pronounced change in the motives and purposes of the individual. When the Constitution of the United States was adopted it was a matter of primary concern to "secure the blessings of liberty" by the establishment of a government which, in the language of the Massachusetts Constitution would "furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights." It will be generally agreed that the "natural rights" thus to be protected by government were not thought of as including any right to the coöperative service of one's fellow-men. Yet today it is apparent that, unless government insures in some manner the continuous inter-

change of services, the enjoyment of natural rights by individuals will not be sufficient to furnish a majority of the inhabitants of the United States with food and clothing.

Thus in the development of ethics we hear today much talk of the "public right" to have coal mined and to have interstate commerce by railroads maintained. Behind this talk of the vague "public right" there is a definite feeling of a private right of each individual to require another individual, upon whom he is dependent for the necessities of tolerable existence, to perform his specialized function in the complicated industrial organization of modern society. The individual is not always keenly impressed by, or responsive to, his obligations to another; but he is usually well aware of the other fellow's obligations to him.

It is not the present purpose to attempt a definition of prevailing ethics in answer to the ancient question: "Am I my brother's keeper?" The discussion up to this point has been intended merely to demonstrate that, in a period of approximately one hundred years, human nature has been so altered in motive and purpose that men now turn to a government which was established chiefly to secure individual happiness through the preservation of individual freedom of action, and seek to use its power to secure individual happiness through restriction upon, and direction of, individual action. From the demonstration of this proposition it should be evident that there must be great flexibility in the law that is to hold together the social fabric wherein such radical changes in the common thought are possible within so brief a space of time.

Let us now consider the development of ethics in narrower fields where the changes come more rapidly and meet less tolerable resistance in the law. The enormous increase of scientific information in the last one hundred years arouses the wonder of all who study history. It seems as though humanity, after stumbling along in darkened jungles for much longer than a hundred thousand years, had suddenly emerged upon open fields, where in the broad light of day great roads had become visible leading into lands of promise more wonderful than ever imagined by the greatest dreamers of by-gone ages. Mankind has rushed madly along these roads, following the pioneers of science. New arts have been revealed, new natural resources have been uncovered. New methods have been devised of utilizing long-hidden treasures of earth and sky and sea for man's pleasure. New realms of thought have been opened to minds freed by the new knowledge from ancient doubts and fears.

It has been inevitable that new standards of right and wrong, new appraisements of what is good and bad, have developed in the new human being that is being bred in these changed conditions. "Man is the creature of his environment." This trite phrase refers not to the physical structure of man, which changes slowly even under great envi-

ronmental change, but refers with far greater emphasis to the mind of man.[2] Is it necessary to bring to mind a thousand truthful tales of life in the South Sea Islands, of life on the Western plains, of life in China and Japan, of life in the mansions and in the hovels of London, Paris, and New York, in order to prove that the ideals, the desires, and the ethics of human beings vary according to their environment? Thus it follows that the ethics of 1922 resemble the ethics of 1822 about as little as the living conditions of today resemble those of one hundred years ago.

"Human nature doesn't change," grumbles the disillusioned old man and the sophisticated stripling. Neither does air nor water nor earth change in its fundamental constituents. But the City of New York, made out of the same physical elements, is not the same as the city of Babylon, no matter how often the lover of metaphors may so describe it. Nor does the man of the airplane and the radio, who has harnessed the lightning, think as did the man of the chariot and the trumpet, who believed that thunderbolts were hurled by a large angry person who wore a long gray beard.

We learn from day to day how ignorant and mistaken were our ancestors about many of the most important things in life—just as posterity will learn of our ignorance and smile at our mistakes. Yet in one field of thought we receive constant admonishment ever to reverence age and to distrust youth, to persist in old folly rather than to seek new wisdom. That is the field of the law.[3] The tallow candle was supplanted by the oil lamp, the oil lamp by the gas light, and the gas light is giving way to the electric bulb. But the precedents of the tallow candle and the oil lamp and the gas light are dragged daily into a courtroom illuminated by electric bulbs.

Let us examine a few of the tallow-candle precedents. The rule in *Foakes v. Beer*,[4] that "payment by the debtor of a less sum than the whole amount of the debt, will not extinguish the debt, although the creditor expressly agrees to receive it in full and gives a receipt or writing to that effect, is well established by abundant authority."[5] This quotation "gives expression to a rule which prevails in most English and American jurisdictions."[6] The rule is based on the legal theory that there is no consideration for the promise to release the portion of the debt unpaid. No twentieth century mind can justify the ethics of this ruling. But it is the law. It gives judicial sanction to bad faith. For

[2] E. G. Conklin, *The Direction of Human Evolution* (1921); J. H. Robinson, *The Mind in the Making* (1921).

[3] Lord Bacon in his essay, *Of Innovations*, writes: "It is good also not to try experiments in States, except the necessity be urgent, or the utility evident. . . ."

[4] (1884, H. L.) 9 A. C. 605.

[5] *Ludington v. Bell* (1879) 77 N. Y. 138, 143. See also 11 L. R. A. (N. S.) 1018, note.

[6] Ferson, *The Rule in Foakes v. Beer* (1922) 31 YALE LAW JOURNAL, 15.

any living person to attempt to justify this ruling is simply to exhibit the anachronism of a medieval mind in a modern body. "The rule has always been regarded as more logical than just," wrote James Barr Ames.[7] Yet the logic justifying obedience to law is that by this means justice will be enforced so far as possible. Then by what logic is the law-giver to justify the enforcement of deliberate and easily avoidable injustice?

Every lawyer is familiar with the struggle to get rid of the fellow-servant rule and the doctrine of assumed risk. Here was a situation where changed conditions made an absurdity of a once reasonable rule.[8] Yet the courts in reverence to the past preferred to support an absurdity and to do injustice, rather than to announce officially that new ethics had developed out of a new environment.

During the recent war the Supreme Court of the United States held the child labor law to be unconstitutional as an interference with states' rights.[9] The act attempted to prevent interstate commerce in the

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[7] *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515.

[8] "The two defenses which the legislature has thus attempted to take away are not entrenched behind any express constitutional provision, nor were they originally created by legislative action. They were both evolved by the courts. . . . . The precedent once made was generally followed, until it became buttressed by a multitude of decisions in practically all of the jurisdictions whose jurisprudence is founded upon the English common law." *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 352, 133 N. W. 209, 216. The opinion of Chief Justice Winslow in this case contains an eloquent exposition of the necessity for changing law to meet changing conditions:

"It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers as well as laymen that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism had forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop with few employees, and the stage coach, there was no such problem, or if there was it was almost negligible. Accidents there were in those days and distressing ones, but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet this difficulty." 147 Wis. at p. 347 *et seq.*, 133 N. W. at p. 215.

[9] *Hammer v. Dagenhart* (1918) 247 U. S. 251, 38 Sup. Ct. 529.

products of the anti-social labor of children. It should be clear to lawyers and even to laymen that when these products became a part of interstate commerce, inasmuch as Congress has exclusive control over interstate commerce, there could not be any states' rights in this commerce which were interfered with by the act. The ethics of a vast majority of the population of the United States had undoubtedly developed to the point where it was regarded as wrong to permit interstate commerce in the products of child labor—just as the prevailing ethics condemned interstate transportation of lottery tickets. Yet the most charitable criticism possible of the Supreme Court's decision is to say that the court, in its preference for old rather than new thoughts, disregarded its own readings of states' rights under the electric light of modern thought and returned to the tallow-candle vision of days before the Civil War.

This child labor opinion shows the baleful effect upon the reasoning powers of sanctifying the law and bowing in continual reverence before the wisdom of earlier generations. Indeed it is essentially an immature quality of mind that insists on reverencing that which must be obeyed. A boy may be required to obey an ignorant, dishonest, evil minded father. It will be admitted that some fathers are not wise, honest, and noble. No true friend of such a boy would desire him to reverence such a father. Yet those eminent leaders of the bar who are constantly advocating a positively servile respect for the Majesty of the Law are the very persons who, by their stiff-necked opposition to every effort to increase the flexibility of the law, do the most to create disrespect for the law and to undermine confidence that justice will be administered in response to the prevailing ethics.

The revered fathers of this republic lacked the ethical wisdom to write into the constitution a prohibition against slavery; and this failure, which resulted from the undeveloped ethics of that period of history, eventually brought about a civil war. At the end of that war another group of revered statesmen amended the constitution to provide that the right to vote should not be denied by any state on account of color. Let it be asked how many of the eminent gentlemen, who orate so nobly about the sanctity of law, are willing to see that part of the fundamental law enforced, so that today all the public officials of the southern states would be elected by a dominating vote of colored men and women?

The most important conclusion which should come out of this last consideration is that respect for, and obedience to, law cannot be obtained unless the law is continually responsive to the ethical demands of the people upon whom the governmental authority is to be imposed. It is, therefore, imperative that the law should *never* be held a sacred heritage, that the law-makers and the law-givers should ever bear in mind that "the principles of righteousness have no fixed abode," and that the constitutional provision, the statute, or the decision that yesterday expressed the ripest wisdom of the ages may become anathema

tomorrow and may be a barrier to progress and a menace to the general welfare.[10]

Particularly it should be made clear that in two great fields of jurisprudence there is a constant necessity to tear down and to rebuild. The first to be considered is the field of crime, and the second the field of industry. Criminal law has developed out of ethical premises that have been largely discarded in modern thought. Industrial law has developed out of conditions of production in small units that have practically disappeared in modern large unit operations. As a result much of the criminal law of to-day is as worthy of reverence as a barbarian idol in a Christian church; and a large portion of the industrial law, as a vehicle of justice, is about as useful as a stage coach would be for a journey from New York to San Francisco. If these seem exaggerated metaphors let us consider a few accepted moralities side by side with prevailing legal procedure.

The ancient idea of crime and punishment was, first a commandment of divine sanction and then the wreaking of vengeance upon the violator. The priest or ruler issued the commandment and punished the offender against his will; his will commonly being described as the will of God, in order to add to the fear of temporary pain, the horror of everlasting agony. The deepest students of the criminal law have agreed that it is founded in the thought of vengeance. The softening influences of civilization have evolved a theory that the purpose of punishment should be reform; and the law-givers have continued in the ancient process of vengeance, while paying deference to the gentle-minded by asserting that their real desire is to reform the erring and to teach them the ways of the righteous.

Meanwhile science has brought forward and demonstrated the importance of two disturbing factors—the limitations upon individual free will and the social responsibility for individual transgressions. For many centuries the person obviously insane, the congenital idiot, has not been generally held to be responsible for his offenses. But recent extensions of the frontiers of physiology and psychology have shown the existence of partial abnormalities of infinite number and variation. We read somewhat impatiently of the "crimes" of subnormals, of morons, of defectives, of perverts—persons mentally diseased from birth or by vicious education. We still clamor that they should be sternly punished. Yet, if we know anything of the scientific information which is at our command, our consciences advise us that we have no right to wreak vengeance upon these irresponsibles.[11]

We must protect the healthy against the sick. We must prevent the

[10] "The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third; the race moves forward and no Canute can stay its progress." *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 349, 133 N. W. 209, 215.

[11] Clarence Darrow, *Crime: Its Cause and Treatment* (1922).

spread of contagious diseases. The mind as well as the body may be contaminated. Society must protect itself against the anti-social individual. This much we all agree upon. But to avenge with cruelty a wrong, to do harm to a wrongdoer, is a method of "protection" originating in the primal self-centered instinct of the savage to strike down the one offending him, without any knowledge of, or interest in, the cause of the offense or the moral responsibility of the offender.

There is a maxim of our law which indicates the survival of this witless instinct most clearly: "A man is presumed to intend the natural consequences of his acts." Ordinarily evidence is admissible to overthrow any legal presumption. But the criminal courts of today will not permit the introduction of evidence that is absolutely necessary to destroy this presumption originating in Neanderthal skulls and preserved by authoritative stupidity. Adequate evidence will not be admitted to show either lack of mental capacity, unless classed as "insanity," or lack of technical knowledge, which would demonstrate that the accused could not possibly have known and therefore could not possibly have intended the consequences which naturally followed upon his act. In the light of this presumption we may observe that a verdict of guilty and a sentence of imprisonment should always be most gratifying to the accused, because these are the natural consequences of his act, which he is presumed to have intended to accomplish!

The intent is the essential element in every criminal act. But it is a hard task to prove an intent, that is, to demonstrate a mental process. Therefore, the law avoids the difficulty by establishing the doctrine that the intention is *presumed* from the act! This logic has truly barbaric simplicity. But how does it sound in the mouth of an educated man of the year 1922? This man may not go so far as to deny the existence of any free will, although many a deep thinker of today will go that far. But any fairly well educated man should know that at least there are many very important limitations upon free will.

He should know, for example, that great fear produces physical changes in the vital organs of the body, changes that have been photographed extensively during the world war.[12] He should know, for example, that the size and functioning of the adrenal gland largely determines the physical courage or cowardice of the individual. With even these bits of knowledge he may understand that the responsibility for an act committed in a panic of fear may lie with the person who created the fear. He may also understand that an act may have been deliberately intended if done by a naturally courageous person; or that the same act may have been practically involuntary, if done by a person whose excessive timidity is the result of a physical deficiency and utterly beyond the control of his will.

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[12] G. W. Crile, *A Mechanistic View of War and Peace* (1915); W. B. Cannon, *Bodily Changes in Pain, Hunger, and Fear* (1915).

We have come to realize something of the irresponsibility of children for crimes, to apportion some of the blame upon parents and some upon the social environment. We have partially developed juvenile courts to modify for children the rigors of the punishments provided for adults. But how far has this intelligent attitude been extended to the treatment of persons of mature years who have the mentalities of children; and how far to the treatment of those who only exhibit the criminal products of their education after they have reached maturity?

It may be admitted that we have not yet arrived at scientific measures of individual and social responsibility for crime, but it is plainly evident that the doctrine of complete individual responsibility survives only among the ignorant. It is evident that the existence of ethics recognizing even partial social responsibility for crime is incompatible with the survival of a law of vengeance. Thus we find the foundations of the criminal law are unsound. We cannot rebuild safely and usefully the ancient structures reared upon such insecure foundations. We must begin to build anew and to transfer the operations of government as rapidly as possible into modern buildings. In the period of such a need how strange it is to hear supposed leaders of legal thought call upon us to observe the majestic beauty and the enduring construction of that house of the law that is crumbling before our eyes! How strange it is to hear them call upon us to lay wreaths before the statues of the ancient builders of those foul dungeons and dismal courtrooms wherein for centuries strong armed, dull-witted men have done unforgivable wrongs to their weaker brethren!

It would require many volumes to detail the growth of our industrial law and to demonstrate how inadequate are its fundamental rules and deep-rooted precedents for the solution of modern problems. The present space will only permit of a few scattering examples.

The sources of industrial law will be found under the significant title of "Master and Servant." The relation of master and servant, which largely grew out of the relation of master and slave, has provided the basic theory of industrial law. In other words, industry has been regarded as an operation conducted by an "owner" and primarily for his benefit. In later development some modification of this theory has been found in industries of such importance to the general public as to be described as "affected with the public interest." In such industries the rights of "owners" have been restricted, not for the benefit of the employees, but for the benefit of the consumers of the product of the industry.

Through all industrial law, consciously felt and directly expressed, or unconsciously assumed and indirectly enforced, appears the dominating conception that the primary objective of industry is the enrichment of the owner of the property or tools utilized in the industry; and that the objectives of the public and of the workers are secondary. In other words, the ethics expressed in industrial law have been the ethics of

primitive men. The underlying premises have been little affected by ideas of social responsibility or of the interdependence of man upon man in modern life.[13]

As a result, in a time when the dependence of one worker upon another is so obvious that there is a general demand that workers should be in some manner compelled to continue to render necessary services, there is lacking, except in the public utility field, any simultaneous and equally strong demand that the owners of properties, the use of which is necessary to the general welfare, should be compelled to keep those properties in service and should be restricted to a reasonable compensation for their use.

The low level of industrial ethics undoubtedly is partly responsible for the inadequacies of industrial law; but here again, as in the field of criminal law, community ethics have developed far beyond those yet expressed in the law. The legal precedents which developed out of the relation of "master and servant" in a small establishment provide utterly inadequate standards for judging the rights and wrongs, the good and the evil, in the workings of a modern industrial organization, where a billion dollars worth of property may easily be subjected to a concentrated control; and where the employment of half a million men and the furnishing of supplies necessary to the life of a nation of one hundred million people may thus be affected by the self interest and emotional prejudice of a small group of ignorant and abnormally greedy men.

To discuss the rights of the employees and the rights of the public in an enterprise of this importance, in the same terms in which one might discuss the rights of the employees and the rights of the public in a shop employing half a dozen workers and serving perhaps two hundred or three hundred people, is largely a waste of time. Yet this is the method whereby the courts cumbersomely have sought to work out solutions of industrial problems. No one would suggest that precedents for regulating the conduct of a toddling child would be particularly valuable in regulating the conduct of a mature and exceptionally strong and able man. But the power of a modern industrial unit to do good or evil is, in comparison with the power of an industrial unit of two hundred years ago, much greater than the power of a mature man in comparison with that of a little child.

Just as is true in the case of the criminal law, a sound structure of industrial law requires absolutely new foundations; foundations in community ethics which arise out of present day conditions. The most important fact in present industrial conditions is that all industry which is vitally important to the community is organized in such large units and under such concentrated control that the establishment and enforcement of community rights in every branch of such industrial operations is unavoidable. We may differ as to the machinery for

[13] *Dodge v. Ford Motor Co.* (1919) 204 Mich. 459, 170 N. W. 668.

enforcement, but we cannot differ as to the necessity. We may all agree that men in the privacy of their homes should not be permitted to enslave or torture those dependent upon them. Yet we will probably agree also that to prevent such cruelties it is not necessary for the state to regulate the details of family life. According to similar logic we may believe that it is necessary to establish and to enforce social ethics in business operations, without believing that it is necessary to put public officials in charge of those operations. We may enforce social ethics without adopting the specific program called "socialism."

The drift of the times can be shown clearly in a consideration of the subject of fixing wages as a matter of law, concerning which there is now widespread discussion. The demand for wage-fixing by law arises from the failure of the directors of industry to organize labor coöperatively and thus to insure its self-interest in continuity of production. The natural law arising out of modern industry is that the coöperative interchange of services between groups of labor is essential to the maintenance of tolerable living conditions. Yet today the workers in the transportation industry may go on strike and thus cripple all other industries and still receive the support of workers in those industries they cripple. This is because those workers recognize the fact that primarily they are being used as profit machines for the benefit of a few and that only secondarily are they being used as parts of a coöperative machinery of service for the benefit of the many. They have a keener sense of a common interest in the effort of other workers to get better wages than in the effort of employers to produce the goods required by their fellow-workers.

But as the lack of effective voluntary coöperation increases community discomfort a demand increases for forced coöperation. It follows ancient lines. When the regulative power of competition lost force in public utilities there arose social ethics asserting a right to compel service at rates fixed as reasonable by public authority. The legal principle was established that profits should be limited to "reasonable compensation" for property used. But one factor was left unregulated —the fixing of "reasonable compensation" for the labor utilized.

Recently the development of organized labor power to the point of stopping or gravely interfering with the conduct of important industries has created an ethical interest in wages; and, as is typical of human ethics, it is a selfish interest, not to insure that the worker shall have fair wages in order to satisfy his needs, but to insure that he shall work in order to satisfy the public needs dependent on his continuity of service.

Perhaps it should have been suggested earlier in this discussion that ethics are not to be confused with ideals. Prevailing ethics are merely the standards of conduct generally regarded as in the interest of the largest number of persons. The ethics of primitive people are concerned with small and immediate interests and the ethics of more enlightened folk involve their larger and more remote interests. But developed

ethics are simply accepted standards of community interest and as such should be embodied in law with less resistance than would meet developed ideals, which, as minority products, obtain community sanction very slowly.

However, fixing wages is not an isolated problem. The vast majority of the population of a modern state is dependent on wages. The wage in one industry affects another. The wage in dollars means nothing until it is translated into commodity terms. But if wages are to be fixed in dollars on the basis of the purchasing power of the dollar, then some control over prices must be established to insure that the purchasing power granted shall be maintained; or else the wage-fixers will engage in a continual losing race with the price-fixers.

Again, if the profits of labor out of industry are to be fixed by law it follows that from the overwhelming majority of workers there will develop the ethics that the profits of those who invest money shall be limited likewise. The precedents for this are already established in public utility service. If a business is affected with the public interest so deeply that wages of labor should be fixed by law, it is plain that the price of the product and the wages of capital must also be regulated.

From these considerations we must develop a new ethical conception of the function of industry and what rewards should be allowed to those who carry on industrial operations and how the rewards should be divided. Under the small unit operations of former centuries the philosophy of individualism was simple and sufficient. A man worked for himself to satisfy his immediate needs. His chief interest in his government was a hostility toward a power that compelled him to work for others and an affection for a power that compelled others to leave him free to work for himself. In the complexity of modern industrial operations there is growing a demand for a governmental power to insure to each man in exchange for his labor the coöperative supply of a reasonable share of the products of the labor of others.

Yet in the face of these developing ethics the law of industry announced by the highest courts in the land is founded on the ancient doctrine that the main purpose of industry is individual profit. It is only in the limited sphere of industry admitted to be affected with the public interest that this doctrine is modified. The ethical idea of "profit" is an individual right to get as much as possible from others in exchange for giving as little as possible. Naturally it follows that those seeking to get as much as possible for the smallest amount of mental labor are foremost in denouncing the effort of those who seek to get as much as possible for the smallest amount of manual labor.

The man most keenly ambitious to make a fortune in ten years that will give him an income without work for the rest of his life is naturally, but comically, most indignant at every effort of the skilled laborer to get more money for less work. His ethics, announced as "a full day's wage for a full day's work" are not the ethics of democracy because they

call for a "full day's work" from one class in order that another class may avoid equal labor. They are not ethics of coöperation consistent with the necessities of modern interdependent society but ethics of profit that grew out of the opportunities of an older individualistic social order.

The development of the ethics of coöperation made necessary by the fact of the coöperative character of modern industry spells the eventual rejection of the older ethical ideas that justified the legal theories of the right of profit. The oncoming ethics of coöperation are incompatible with the prevailing laws of profit.

It has been a necessity arising from the spatial limits of this condensed presentation that the case to be considered has been only stated and no attempt has been made to prove it. The underlying facts are readily available to any student. The social condition described is not one which theorists may assume to be developing, but is the condition of life which exists in the United States of America today. We are living in a period of such an organization of production and distribution of the necessities of life that the coöperative exchange of labor must be a continuous process, as any stoppage results in the sudden submergence of vast numbers of peoples in waves of misery and acute want, which they could not foresee, or foreseeing, could not escape. The grim and relentless facts of modern life are developing modern ethics—a code of right and wrong based primarily on the applied instinct of self-preservation.

The ancient ethics of self-sufficient individualism and individual responsibility survive most unhappily beyond their useful years through the preservative quality of the law. The natural resistance of law is increased by the natural density of the legal mind. The very qualities that insure the making of a good lawyer insure this mental solidity. No one alive to the egregious blunders of even the greatest leaders of human thought and action can preserve reverence for any human institution merely because it is old. The older it is the more certain is it that in its construction are great masses of crumbling thought and rotting assumptions that endanger the safety and usefulness of the entire structure. We learn from the wisdom of our sires largely what mistakes we may avoid and obviously none of the truths that we are to discover.

The law is not a science and its rules are of little permanence. We cannot build as the natural scientist may—laying one truth upon another —because we do not quarry truths in the work of law-making. The law is the temporary expression in a temporary pattern of the ever changing ethics of the human will behind the law. The rules whereby men may live together in comparative peace and for mutual advantage are set forth in the law; and as the conditions of living change it is obvious that the law must change.

Yet there is a resistance to change inherent in the institutions for creating and enforcing the law. There is obvious virtue in certainty and

permanence in the law. But in a time of rapid development in the processes that determine living and working conditions, it is inevitable that the value of permanence in legal rules must give way before the necessity of consistently rapid development of law. There is no period in all the known history of mankind wherein there has been such speed and sweep in the development of living and working conditions as during our lifetime. The resistance of the law to the pressure of new ethics has impaired the common faith in an appeal to law for the decision of contending claims of right. It has been borne in upon the consciousness of masses of people that injustice of vast consequence is perpetuated in the name of law and that far too often the law is utterly inadequate to promote the general welfare in matters where the power of government offers apparently the only force capable of checking abuses of private power developed under legal sanction.

In such a time as that in which we live the abstract praise of law and order is often an actual incitement to lawlessness among those who suffer daily discomfort and periodic misery from the resistance of the law to enforcement of what they know to be their rights. Think of the reactions in homes of poverty, among undernourished, undereducated men and women, when the law is invoked to force the acceptance of inadequate wages, to perpetuate living conditions of poor food, scanty clothes, and wretched housing; and when simultaneously that same law is invoked to protect the squeezing of a fortune out of underpaid labor as a "right of property." Think of the reactions when the products and victims of abnormal environment suffer the vengeance of the criminal law because they do not behave like normal persons!

In a time when the spirit of lawlessness is increasing the trivial-minded may enjoy writing and listening to speeches extolling the obvious advantages of "law and order." But studious persons will realize that lawlessness develops out of law inadequacy and will seek first to analyze the wrongs that are promoted and the rights that are denied by prevailing law and then to devise, not new statutes based on old ideas, but new legal theories responsive to new ethical demands.

To protect its inhabitants many an ancient city was surrounded by a wall that, in the course of generations, it was found necessary to tear down as a barrier to progress. A great wall was once reared across the path of a nation's enemies and behind that wall the nation in unhappy security decayed. The fortifications of one generation may be the prison walls of the next. It is in the ethics of today rather than in the resistant law of yesterday that we should seek for the source and sanction of those rules of conduct that will insure the peace and good order of society.